Tentative Rulings for September 3, 2015
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

15CECG01772 ***Pak, et al. v. Kim, et al.*, (Dept. 403) Motion to Vacate Judgment. Defendant Jung Han Kim, aka Jay Kim, and Mr. Robert J. Higuera are to give testimony at an evidentiary hearing on whether service on Defendant Kim of the Oregon complaint actually occurred or whether the judgment is void for lack of proper service.**

15CECG01908 ***City of Fresno v. Occhionero* (Dept. 502)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

14CECG02569 ***Yaraei v. Coalinga Regional Medical Center*, et al. (Motion for Summary Judgment/Adjudication) is continued to Thursday, September 10, 2015 at 3:30 pm in Department 503.**

14CECG00231 ***Robinson v. Phi* (Motion for Summary Judgment/Adjudication) is continued to Thursday, September 24, 2015, at 3:30 p.m. in Department 403.**

14CECG00658 ***Carl v. Modern Custom Fabrication, Inc.* (Dept. 502) [Hearing on motion tor preliminary approval of class action settlement continued to October 20, 2015, at 3:30 p.m. in Dept. 502]**

14CECG02159 ***Ordaz v. CSAA Insurance Exchange et al.* (Dept. 503) [Hearing on motion to compel is continued to September 17, 2015 at 3:30 p.m. in Dept. 503] [Hearing on Motion for Summary Judgment is continued to September 24, 2015 at 3:30 p.m. in Dept. 503]**

14CECG02086 ***Hovannisian et al. v. First American Title Ins. Co.* (Dept. 402) is continued to October 1, 2015 at 3:30 p.m. in Dept. 402**

15CECG00160 ***Jorge Gonzalez v. Carlos Lopez* is continued to Thursday, September 10, 2015 at 3:30 p.m. in Dept. 503.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

2 **Tentative Ruling**

Re: ***Serpa v. Hernandez et al.***
Superior Court Case No. 11CECG03065

Hearing Date: September 3, 2015 (Dept. 402)

Motion: motions to compel initial responses to form interrogatories, set one and sanctions

Tentative Ruling:

To grant plaintiff Susan Serpa's motions to compel Velocity Recycling, Inc., Velocity Iron & Metal, Inc., Velocity Recycling and Velocity Transport, Inc. to each provide initial verified responses to form interrogatories, set one. (Code of Civil Procedure sections 2030.290(b).) Defendants to each provide complete verified responses to all discovery set out above, without objection within 10 days after service of this order.

To grant plaintiff Susan Serpa's motion for sanctions. Velocity Recycling, Inc., Velocity Iron & Metal, Inc., Velocity Recycling and Velocity Transport, Inc. are each ordered to pay monetary sanctions to the law offices of K.W. Davis Attorneys at Law in the amount of $288.13 within 30 days after service of this order. CCP §§2023.010(d), 2023.020(a).

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: **JYH** **on** **9/2/15** .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(28) ***Tentative Ruling***

Re: **Brown v. Bank of America, N.A., et al.**

Case No. 15CECG01171

Hearing Date: September 3, 2015 (Dept. 403)

Motion: By Defendants DOCX, LLC, and Lender Processing Services, Inc. to sever Plaintiff Larry Brown's Claims Real Property Claims Outside of Fresno County; To Transfer Venue of Severed Claims; for Sanctions.

Tentative Ruling:

To deny the motion in its entirety without prejudice to a motion to sever and/or transfer under more appropriate statutory authority. The Court will not award sanctions.

Explanation:

Defendants rely on Code of Civil Procedure §1048, subdivision (b) as authority for their request to sever the various causes of action on the grounds of improper venue. Subsection (b) states in full:

> (b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States.

The Court agrees with the Plaintiff that, although Section 1048, subdivision (b) gives this Court the power to conduct separate trials, it does not confer the power upon the Court to sever the case into separate new cases as requested by Defendants. As noted by Plaintiff, the section was amended in 1972 to remove the language which authorized severance of part of a case, and therefore, resort to this statute for these purposes is incorrect. This is a position that is supported by the dicta in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 737, fn.3 ("Code of Civil Procedure section 1048 no longer authorizes severance of a civil action").)

Defendants are correct that no case has specifically held that severance is no longer allowed under Section 1048, subdivision (b), despite the removal of the literal reference to "severance." Defendant's reliance on *Kennedy/Jenks Consultants v.*

Superior Court (2000) 80 Cal.App.4th 948, 964-65, for allowing severance in the present case is misplaced. The language in that case involved whether or not a complaint should be severed from a cross-complaint, not whether the internal claims of a pleading should be separated (the language is also arguably dicta).

As the Supreme Court observed, the statute, as currently drafted, allows a Court to order separate trials for issues and claims and not for the purposes presented in this case. (*Morehart, supra,* 7 Cal.4th at 737, fn.3.) Therefore, because Defendants have relied on a statute that does not provide the relief it seeks, the Court denies the motion. This denial is without prejudice to the Moving Defendants, or any other defendant, making a motion for severance and/or transfer under appropriate authority.

Because the Court denies the motion to sever under Section 1048, subdivision (b), the motion for an order "Transferring Venue of Severing Claims" is denied, and the Court exercises its discretion and will not award either party expenses or attorney's fees pursuant to Code of Civil Procedure §396b, subdivision (b).

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 09/02/15 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

(5)

Tentative Ruling

Re: ***Conner et al. v. Northside Church; National Union Fire Insurance Company of Pittsburgh, PA, Intervener***
Superior Court Case No. 15 CECG 01037

Hearing Date: September 3, 2015 (**Dept. 501**)

Motion: By Defendant to Strike Plaintiff's Claim for Punitive Damages

Tentative Ruling:

To grant the motion to strike without leave to amend. An Answer to the Plaintiffs' complaint is to be filed within 10 days of notice of the ruling.

Explanation:

Plaintiffs filed a form complaint on April 1, 2015. It alleges two causes of action for general negligence and premises liability. According to the allegations of the complaint, on or about April 2, 2013, Plaintiff Michael Conner was hired to inspect an attic area of a building owned by the Defendant for the installation and/or repair of fire sprinklers. After entering the opening of the attic, Plaintiff was required to walk on beams to get to the walkway where the inspection would take place. As he entered the attic, a bright light blinded the Plaintiff and he missed his step. He fell 30 feet to a concrete floor and suffered serious injuries. See ¶ GN-1 and ¶ Prem-L 1. Plaintiff Shann Conner seeks damages in the form of loss of consortium.

On July 17, 2015, Defendant filed a motion to strike the claim for punitive damages. Plaintiff filed a statement of non-opposition to the motion.

Punitive Damages

A plaintiff must allege ***specific facts*** showing that defendant's conduct was oppressive, fraudulent or malicious (e.g., that defendant acted *with the intent* to inflict great bodily harm on plaintiff or to destroy plaintiff's property or reputation). [*Smith v. Sup.Ct. (Bucher)* (1992) 10 Cal.App.4th 1033, 1041–1042; *Anschutz Entertainment Group, Inc. v. Snepp* (2009) 171 Cal.App.4th 598, 643—allegations that defendant's conduct was intentional, willful, malicious, performed with ill will toward plaintiffs and in conscious disregard of plaintiffs' rights did not satisfy specific pleading requirement]

The allegations set forth in Exemplary Damages Attachment states only that the Defendant "violated the laws of the State of California and ordinances of Fresno County and the City of Clovis by failing to institute safe construction designs, drawings, construction and maintenance of the above premises so as to protect the public from the harm anticipated by the law, statute, and or ordinance. But, these allegations fail to meet the requirement of Civil Code § 3294(a). Therefore, the motion to strike will be granted without leave to amend.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 9/2/15 .

(Judge's initials) (Date)

Tentative Rulings for Department 502

(20) **Tentative Ruling**

Re: ***Scott v. Kirk***
Superior Court Case No. 14CECG02668

Hearing Date: **September 3, 2015 (Dept. 502)**

Motion: Motion to compel discovery responses from plaintiff Lisa Scott

Tentative Ruling:

As to the interrogatories and production demand, to deny without prejudice unless defendant appears at the hearing with an amended declaration addressing the deficiencies discussed below. If defendant intends to do so, he must call in to request oral argument pursuant to Local Rule 2.2.6 and Cal. Rules of Court, Rule 3.1308(a)(1).

As to the requests for admissions, to deny without prejudice to defendant's right to bring a motion under Code Civ. Proc. § 2033.280(b).

Explanation:

Based on the information provided, it appears that an order compelling responses to the interrogatories and production demands would be warranted. However, the declaration submitted in support of the motion does not include authenticated copies of the discovery propounded. Copies of the discovery, as well as any letters or communications referenced in the declaration, should be provided with the motion.

As for the requests for admissions, defendant seeks an order compelling plaintiff to provide a response thereto. However, where a timely response is not served, the propounding party makes a motion the statutorily authorized motion is "for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction …" (Code Civ. Proc. § 2033.280(b).) The statute does not authorize a motion for an order compelling a response. So with regards to the requests for admission, the motion should be denied, without prejudice to defendant's right to make a motion under section 2033.280(b).

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 8-28-15 .
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Banda-Wash v. Wash***
Case No. 15 CE CG 00967

Hearing Date: September 3rd, 2015 (Dept. 502)

Motion: Plaintiff/Cross-Defendant Maria Banda-Wash's Demurrer to Cross-Complaint

Tentative Ruling:

To sustain the demurrer to the first cross-claim for failure to state facts sufficient to constitute a cause of action, with leave to amend. (Code Civ. Proc. § 430.10, subd. (e).) To overrule the demurrer to the second, third, and fourth cross-claims. (Ibid.)

Defendant/cross-complainant John Wash shall file and serve his first amended cross-complaint within ten days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

With regard to the first cross-claim for misapplication of money and property and partnership accounting, it appears that John Wash is attempting to allege that that Maria Banda-Wash misappropriated partnership money and property from the Wash & Wash Partnership, and that she has refused to give John an accounting of the partnership books, assets and accounts. (Cross-Complaint, ¶¶ 10-15.) However, John never clearly alleges that Maria was a partner in the Wash & Wash Partnership. He only alleges that, "In 1998, cross-complainant and others who owned the subject property, formed a partnership, named Wash & Wash at Fresno County, California, for the purpose of carrying on the business of managing real property and operating the farming of the citrus crops located on the subject property." (*Id*. at ¶ 8.) He also alleges that "Since June 2007, the subject property is owned by cross-complainant John Wash and the Thomas R. Wash and Maria S. Banda Revocable Trust, each owning one-half divided interest." (*Id*. at ¶ 7.)

However, John does not clearly allege that Maria was a partner in the Wash & Wash Partnership, which was formed several years before the Trust obtained an ownership interest in the property. He only alleges that he and "others who owned the subject property" were partners in Wash & Wash, without specifying who the "others" were. Therefore, the allegations are insufficient to state a claim against Maria for misappropriating partnership property and funds, or for an accounting of the partnership books and assets. As there is no allegation that Maria was even a member of the partnership, John has not stated a claim against her arising out of her duties to him as a partner.

Maria also argues that the settlement agreement and subsequent judgment entered in the previous action between the parties resulted in a waiver of the right to an accounting of partnership assets. Maria submits a partial copy of the judgment and the settlement agreement in the prior action and asks that the court take judicial notice of these documents. The court intends to take judicial notice the fact that these documents exist under Evidence Code section 452, subd. (d), as they are part of the court record in the other case. The settlement agreement does contain statements that the parties agree to dissolve the Wash & Wash partnership and "waive all partnership accounting." (Exhibit A to Request for Judicial Notice, Settlement Agreement, p. 1.) However, it is unclear whether this waiver would cover the misapplication of funds and property alleged in the cross-complaint, which allegedly occurred after the settlement agreement was signed. (Cross-Complaint, ¶ 10.) Therefore, the court will not find that the settlement agreement and judgment necessarily bar John's claims for misappropriation of funds and accounting. Consequently, the court intends to sustain the demurrer to the first cross-claim, but it will grant leave to amend to allow John to allege more facts regarding whether Maria was a partner in the Wash & Wash Partnership.

Next, the court intends to overrule the demurrer to the second cause of action for conversion. Maria argues that John has not stated a valid claim for conversion against her because he has not adequately alleged facts showing that he owned the property that is the subject of the claim.

"To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." (*Del E. Webb Corp. v. Structural Materials Co*. (1981) 123 Cal.App.3d 593, 610-611, internal citations omitted.)

Here, John has alleged that, "At all times herein mentioned, cross-complainant did own certain equipment, tools, citrus crops and nursery trees, and still is entitled to possession of said equipment, tools, citrus crops and nursery citrus trees." (Cross-Complaint, ¶ 18.) While John does not allege specific facts to show that he owned title to the equipment, crops, and trees, there is no requirement that he must allege facts showing that he held actual title to the property that was taken. The allegation that he owned the property is sufficient to support the conversion claim. Requiring him to allege that he purchased or possesses title to each and every tool, piece of equipment, tree or piece of fruit that is the subject of the conversion claim would be unduly cumbersome, and would be tantamount to requiring an evidentiary showing in order to state a claim.

Also, while Maria argues that John must allege the specific sum converted, this requirement only applies where the subject of the conversion claim is money, not property. For example, in *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, the court noted that "money cannot be the subject of an action for conversion unless a specific sum capable of identification is involved…" (*Id*. at 599.) Here, the subject of the conversion claim is equipment, tools, crops, and trees, not money. Therefore, John does not need to allege that the property was valued at a specific sum in order to state a claim for

conversion. The court thus intends to overrule the demurrer to the second cause of action.

Next, with regard to the demurrer to the intentional and negligent interference with economic advantage causes of action, Maria argues that John has not alleged that her actions were independently wrongful by some measure other than the interference itself, and therefore he has not stated valid interference claims. It is true that claims for intentional and negligent interference with *prospective* economic advantage must allege that the defendant engaged in conduct that was independently wrongful. Here, however, it appears that John is alleging claims for interference with *existing* economic relationships.

"[A] plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc*. (1995) 11 Cal.4th 376, 393.)

Here, however, although the cross-complaint is somewhat vaguely alleged, it appears that John is alleging that Maria interfered with his existing contractual relationships with suppliers and laborers, not prospective economic relationships that had not yet solidified into binding contracts. He alleges that Maria knew that he had an interest in citrus farming on the subject property, and that he needed to irrigate and harvest his crops for the 2013 and 2014 seasons. (Cross-Complaint, ¶¶ 25, 33.) Maria also knew that he had "contracts and relationships *existing* between cross-complainant and the suppliers, laborers and buyers related to the farming of the citrus crops located on the subject property for the 2013 and 2014 seasons." (*Id*. at ¶¶ 26, 34, emphasis added.) He then alleges that Maria intentionally or negligently interfered with the relationships by interfering with the activities of the suppliers, laborers, and buyers at the property, such that they could not continue their efforts to irrigate and harvest the crops for the 2013 and 2014 seasons. (*Id*. at ¶ 35.) She also ordered them to leave the property and cease their labor and relationships related to the farming of the citrus crops located on the property. (*Id*. at ¶ 27.) These acts caused the suppliers, laborers and buyers to "sever their business relationship" with John, thus causing him financial harm. (*Id*. at ¶¶ 28, 30, 36, 37.)

Thus, it appears that John is alleging that he already had existing relationships with his suppliers, laborers, and buyers, and that Maria interfered with these relationships and caused them to be terminated. As a result, John seems to be alleging intentional and negligent interference with existing contractual relationships, not prospective economic relationships. However, the "independently wrongful" element is not required in order to state a claim for interference with existing contractual relationships.

"Wrongfulness independent of the inducement to breach the contract is not an element of the tort of intentional interference with existing contractual relations, however… Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage, it is not necessary that

the defendant's conduct be wrongful apart from the interference with the contract itself." (*Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 55, internal citations omitted.)

Therefore, since John seems to be alleging interference with existing contractual relationships with his suppliers, laborers and buyers, rather than interference with prospective economic relationships, he does not have to allege that the interference was wrongful by some measure other than the fact of the interference itself. Simply alleging that Maria intentionally or negligently interfered with the existing contracts is enough to support the claim. As a result, the court intends to overrule the demurrer to the third and fourth causes of action.

Finally, to the extent that Maria demurs to the unfair business practices claim, the court intends to overrule the demurrer. First of all, John has not attempted to state a separate cause of action for unfair business practices. He simply alleges that the acts of intentional interference also constituted unfair business practices under Business & Professions Code section 17200 and common law precedent. (Cross-Complaint, ¶ 29.) Therefore, there is no separate cause of action for unfair business practices to which Maria can demur.

Even if there were a separate unfair business practices claim, the allegations of intentional interference with existing contractual relationships would support the unfair business practices cause of action as well. As discussed above, John has adequately alleged a claim for intentional interference with existing economic relationships. Therefore, the court intends to overrule the demurrer to the unfair business practices cause of action, to the extent that such a claim has been alleged.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 8-26-15 .

(Judge's Initials) (Date)

(6)

Tentative Ruling

Re: ***Sunflower Valley Farms, LLC v. Pace***
Superior Court Case No.: 15CECG01288

Hearing Date: September 3, 2015 (**Dept. 502**)

Motions: (1) Demurrer to cross complaint filed by Cross Complainant Gary Norton by Cross Defendants Milton Pace, and L&P Farms, LLC

(2) Motion to strike portions of the cross complaint filed by Cross Complainant Gary Norton by Cross Defendants Milton Pace, and L&P Farms, LLC;

(3) Demurrer to answer of Cross Defendant Gary Norton to cross complainants Milton Pace's and L&P Farms, LLC's, first amended cross complaint;

Tentative Ruling:

(1) To overrule the demurrers to the cross complaint as to the first cause of action for declaratory relief, to overrule the demurrers as to the second cause of action for breach of contract as to Cross Defendant L&P Farms, LLC, and to sustain as to Cross Defendant Milton Pace, without leave to amend; to sustain the general demurrer to the third cause of action for breach of fiduciary duty as to Cross Defendant L&P Farms, LLC, without leave to amend, and to sustain the general demurrer as to Milton Pace, with leave to amend, overruling the special demurrers; and to overrule the general and special demurrers as to the fourth cause of action for an accounting;

(2) To grant the motion to strike portions of the cross complaint, in part, striking the words "…~~and on or about April 10, 2014, the parties signed an assignment that so provided~~. A true and correct copy of that assignment is attached hereto as Exhibit 2." (Cross Complaint, ¶10:22-26.) The strike-through words are stricken – the reference to the assignment remaining, without leave to amend; and to strike the request for punitive damages, with leave to amend;

(3) To overrule the demurrers to the first, second, third, sixth, and tenth affirmative defenses; to sustain the general demurrers to the fourth, fifth, seventh, eighth, and ninth affirmative defenses, with leave to amend as to all except the seventh affirmative defense for retaliation.

Mr. Norton is granted 10 days' leave to amend. The time in which the pleadings can be amended will run from service by the clerk of the minute order. All new allegations in the amended pleadings, are to be set in **boldface** type.

Explanation:

Demurrer to cross complaint filed by Cross Complainant Gary Norton by Cross Defendants Milton Pace, and L&P Farms, LLC

The first cause of action for declaratory relief states facts sufficient to constitute a cause of action and is not uncertain. (Code Civ. Proc., §§430.10, subds. (e), (f).) The demurrers are overruled.

Because the cross complaint alleges the breach of only one contract (discussed below), declaratory relief is proper to determine if Cross Complainant Gary Norton is entitled to a membership in either L&P Farms, LLC ("L&P Farms") or Pyramid Hills Pistachios, LLC ("Pyramid Hills"), based in part on the unsigned agreements. (Code Civ. Proc., § 1060.)

The second cause of action for breach of contract states facts sufficient to constitute a cause of action against L&P Farms only and is not uncertain. (Code Civ. Proc., §§ 430.10, subds. (e), (f).) The demurrers are overruled as to L&P Farms only, and sustained as to Milton Pace, without leave to amend.

The cross complaint alleges that Mr. Pace is in breach of the agreement but the only agreement signed is the memorandum of understanding between Mr. Norton and L&P Farms, signed by Mr. Pace as the latter's manager. There's also no uncertainty here, and the other unsigned agreements are not binding contracts. (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 61-62.) A demurrer does not lie to a part of a cause of action. (*Campbell v. Genshlea* (1919) 180 Cal. 213, 217.) Leave to amend is properly denied where no potentially effective amendment is both apparent and consistent with plaintiff's theory of the case. (*Camsi IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1542.)

The third cause of action fails to state facts sufficient to constitute a cause of action (although it is not uncertain). (Code Civ. Proc., § 430.10, subds. (e), (f).) The demurrer is sustained, with leave to amend.

Mr. Norton was not a member of L&P Farms when he entered into the memorandum of understanding with L&P Farms and in fact, the entire purpose of the memorandum of understanding was to permit Norton to *become* a member of L&P Farms. The memorandum of understanding stated under COMPENSATION, #4: "The equity will remain the property of the LLC until Norton has completed 5 years service." [sic] In other words, although Mr. Norton was also, pursuant to the memorandum of understanding, to share in the profits and losses each year based on his accumulated equity position at that time, he wouldn't become a full-fledged member until after five years. The memorandum of understanding specifically contemplated that it would be "replaced by an LLC agreement" apparently meaning that the limited liability company documents would be amended to show Mr. Norton's membership percentage at the end of five years.

Concerning Mr. Pace, an employer doesn't owe a fiduciary duty to an employee. (*Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1391.)

Finally, there are no allegations that L&P Farms owed Mr. Norton any duty and in fact, fiduciary duties in a limited liability company are generally owed by members and managers to each other, not by the limited liability company itself. (Corp. Code, § 17704.09.)

The fourth cause of action for an accounting states facts sufficient to constitute a cause of action and is not uncertain. (Code Civ. Proc., § 430.10, subds. (e), (f).) The demurrers are overruled.

Although Mr. Norton wasn't yet a member, pursuant to the memorandum of understanding with L&P Farms, he was entitled to share in the profits each year based upon the accumulated equity position at that time each year. Because if he succeeds some of the funds would come from Mr. Pace's interest, the cause of action states a claim against him as well.

Motion to strike portion of cross complaint of Gary Norton by Cross Defendants Milton Pace, and L&P Farms, LLC

The motion is granted, in part, striking the words "…~~and on or about April 10, 2014, the parties signed an assignment that so provided~~. A true and correct copy of that assignment is attached hereto as Exhibit 2." (Cross Complaint, ¶10:22-26.) Only the words shown in strike-through font are stricken – the reference to the assignment remain, because Mr. Norton alleges that the agreement was reached between him and L&P Farms. No leave to amend is granted concerning this allegation.

The request for punitive damages is stricken, with leave to amend, because the facts supporting an award of punitive damages against Pace are not sufficiently vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people. (*American Airlines, Inc. v. Sheppard, Mullin, Richert & Hampton* (2002) 96 Cal.App.4th 1017, 1047-1048.)

The remaining allegations are not stricken because they relate to Mr. Norton's cause of action for declaratory relief.

Demurrer to answer of Cross Defendant Gary Norton to cross complainants Milton Pace's and L&P Farms, LLC's, first amended cross complaint

The first affirmative defense that the cross complaint does not state facts sufficient to constitute a cause of action, may be made by demurrer or answer, and is not waived even if not asserted by demurrer or answer. (Code Civ. Proc., §§ 430.10, subd. (e); 430.80, subd. (a).) It raises only a question of law – whether or not the cause(s) of action in the complaint state facts sufficient to constitute a cause of action, and consequently need allege no facts to support it. (Code Civ. Proc., § 589 [Issues of law

arise upon demurrer to the complaint, cross complaint, or answer, or upon a motion to strike.]) The demurrer to it is overruled.

The second affirmative defense based on privilege states facts sufficient to constitute a defense and is not uncertain. (Code Civ. Proc., § 430.20.)

The determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer. (*South Shore Land Co. v. Peterson* (1964) 226 Cal.App.2d 725, 733.)

Privilege is a defense that acknowledges that at least a portion of the conduct of which the cross complainant complains, but asserts that the cross defendant's conduct was authorized or sanctioned by law. Most commonly, absolute and qualified privileges are defined by statute concerning libel and slander. (Civ. Code, § 47; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§561 et seq.)

Pursuant to sections 45 and 46 of the Civil Code, libel and slander are defined as false and "unprivileged" publications of specified matter, and falsity is essential to defamation. (*O'Connor v. McGraw-Hill, Inc.* (1984) 159 Cal.App.3d 478, 485.)

Read in conjunction with the causes of action for slander and defamation per se in the cross complaint, this affirmative defense is good against the general and special demurrers, and is overruled.

The third affirmative defense for "statements made were truthful and in good faith" states facts sufficient to constitute a defense and is not uncertain, for the same reasons as the second affirmative defense, and the demurrers to it are overruled. (Code Civ. Proc., § 430.20.)

The fourth affirmative defense for set off fails to state facts sufficient to constitute a defense, although it is not uncertain. (Code Civ. Proc., § 430.20.) The demurrer is sustained, with leave to amend.

Under the equitable doctrine of set-off, a cross defendant may offset sums owing from the cross complainant to the cross defendant, with the result that the offsetting amounts are canceled and the cross defendant is obligated to pay plaintiff only the net amount, if any. (*Harrison v. Adams* (1942) 20 Cal.2d 646, 648.)

Since no cause of action in the cross complaint alleges facts from which a set off could arise, the facts supporting the set-off must be set forth with essentially the same format and detail as a cause of action. (Code Civ. Proc., §431.70; *Wallace v. Bear River Water & Mining Co.* (1861) 18 Cal. 461, 464-465.)

The fifth affirmative defense to perform obligation and duties fails to state facts sufficient to constitute a defense, and is uncertain. (Code Civ. Proc., §430.20.)

Usually the defense is for prevention of the cross defendant's own performance of a contract, not the cross complainant's performance. (Civ. Code, §§ 1511-1515;

Puritas Laundry Co. v. Green (1911) 15 Cal.App. 654, 659 ["If performance was prevented by the acts of plaintiff, such fact would constitute a sufficient defense to recovery."])

Here, it's unclear from the affirmative defense what obligations and duties are at issue, whether contractual or otherwise. The demurrers are sustained, with leave to amend.

Waiver is an affirmative defense that may be argued against many different causes of action since it asserts a plaintiff has waived whatever right or privilege is essential to plaintiff's claim. (Judicial Council of Cal. Civ. Jury Instns. (Sept. 2003) CACI No. 336.) "Waiver is the intentional relinquishment of a known right with knowledge of the facts." (*Earl of Loveless, Inc. v. Gabele* (1991) 2 Cal.App.4th 27, 35.)

Equitable estoppel is a defensive doctrine operating to prevent one party from taking an unfair advantage of another. (*Franklin v. Meridia* (1868) 35 Cal. 558, 567.) The essence of estoppel is that, through false language or conduct, the person to be estopped has caused another to act in a way that person would not otherwise have acted and has caused injury as a result. (*State Compensation Insurance Fund v. Workers' Compensation Appeals Board* (1985) 40 Cal.3d 5, 16.)

When asserted as a defense, estoppel must be affirmatively or specially pleaded with the underlying facts supporting the estoppel. (*Crittenden v. McCloud* (1951) 106 Cal.App.2d 42, 47.) When the complaint itself sets out the facts that establish equitable estoppel, the court may find that the answer need not expressly include the defense. (*Insurance Co. of the West v. Haralambos Beverage Co.* (1987) 195 Cal.Appl.3d 1308, 1321, disapproved of on other grounds in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 838-839 [fn. 12].)

This affirmative defense alleges that cross complainant has engaged in a pattern of behavior regarding the various business entities involved in this case as outlined in the complaint and the cross complaint filed by Mr. Norton, and the actions of cross complainant estop him from pursuing any claims or in the alternative, his course of conduct and behavior constitutes a waiver of any claims. Mr. Norton is alleging that the actions alleged in the cross complaint allege a waiver or an estoppel, and the demurrers to the sixth affirmative defense are overruled.

The seventh affirmative defense for retaliation fails to state facts sufficient to constitute a defense and is uncertain. (Code Civ. Proc., § 430.20.) There is no known affirmative defense for retaliation. Leave to amend is denied. (*Camsi IV v. Hunter Technology Corp., supra,* 230 Cal.App.3d 1525, 1542.)

The eighth affirmative defense for unclean hands fails to allege facts sufficient to constitute an affirmative defense and is uncertain. (Code Civ. Proc., § 430.20.) The demurrers are sustained, with leave to amend.

The unclean hands doctrine, "in general, prescribes, at law and in equity, that the courts will not aid either party to a transaction which is illegal or contrary to public

policy where the parties are equally at fault, but will leave the parties where it finds them." (*Stockton v. Ortiz* (1975) 47 Cal.App.3d 183, 200.)

The unclean hands must arise from the conduct in the same transaction, and the party seeking to invoke the unclean hands doctrine must have been injured by the alleged wrongful conduct. (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 345 [fn. 4].)

The pleading of the unclean hands defense should include a summary statement of facts supporting a finding of unclean hands. (Taylor Schwing, 2 Cal. Affirmative Defenses (2d. ed. March 2014), § 45:15, Pleadings.)

The ninth affirmative defense for failure to mitigate fails to allege facts sufficient to constitute an affirmative defense and is uncertain. (Code Civ. Proc., § 430.20.) The demurrers are sustained, with leave to amend.

A plaintiff's failure to mitigate or ameliorate the injuries caused by a defendant is a defense not to the defendant's liability but to the amount of damages for which the defendant is liable. As a general rule, a plaintiff may not recover damages that could have been avoided if reasonable and appropriate mitigation efforts within the plaintiff's means had been taken. (*Steelduct v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 649.)

There are no facts alleged to support this defense. (*Vitagraph, Inc. v. Liberty Theatres Co.* (1925) 197 Cal. 694, 699-700.)

The tenth affirmative defense states facts sufficient to constitute an affirmative defense of nonjoinder (not misjoinder), and is not uncertain. The defense of non-joinder arises when a party that must or should be joined for proper resolution of the litigation is not joined. (Code Civ. Proc., §§ 430.10, subd. (d); 389.)

This affirmative defense alleges that according to the allegations of the cross complaint, there are other owners of L&P Farms but said parties are not named herein as parties. Mr. Norton is informed and believes that those owners are necessary parties to this action and that cross complainant lacked the authority to file any of the claims herein.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 9-2-15.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(2)

Tentative Ruling

Re: ***Flores v. Sotelo***
Superior Court Case No. 15CECG01359

Hearing Date: September 3, 2015 (Dept. 503)

Motion: Petition to Compromise a Minor's Claim

Tentative Ruling:

To Grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 8-28-15 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Torres v. Lennar Homes of California***
Court Case No. 13CECG00419 (Master File, consolidated with Case No. 13CECG01732)

Hearing Date: **September 3, 2015 (Dept. 503)**

Motion: Plaintiffs' Motion for Substitution of Successor in Interest of Deceased Plaintiff

Tentative Ruling:

To grant. Plaintiff is required to serve all parties who have appeared in this action with the order granting the motion.

Explanation:

A pending action does not abate by reason of the death of a party if the cause of action survives. (Code Civ. Proc. § 377.21.) Instead, the cause of action passes to the decedent's successor(s) in interest. (Code Civ. Proc. § 377.30.) After the death of a person who commenced an action or proceeding, the successor can file a noticed motion to be substituted in place of that person. (Code Civ. Proc. § 377.31.) The motion must be accompanied by a declaration/affidavit of the proposed successor in interest. (Code Civ. Proc. § 377.32.) The declaration of Sharon Nikkel satisfies the requirements of the statute. She appears to be the proper party to substitute in place of the decedent.

However, there is an issue with service of this motion. Initially, no proof of service of the motion was filed, but this has been corrected. However, the proof of service now filed indicates that not all parties who have appeared in the action were given notice of this motion. When a defendant or cross-defendant appears in an action, that party or his/her/its attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. Where a defendant has not appeared, service of notice or papers need not be made upon the defendant. (Code Civ. Proc. § 1014.) The proof of service of this motion indicates that only the special master, the document depository service, Daren Cullins (counsel for three of the cross-defendants) and Joshua Bevitz and Alan Packer (attorneys for Lennar Fresno, Inc.) were served. There is no indication of service on Tim McNeil, Benjamin Blaisdell, or Ramsey Kubein, counsel for other cross-defendants who appeared in the action.

The statute governing this motion, Code of Civil Procedure Section 377.31 refers only to a "motion" but does not expressly require a "noticed motion." It might be argued that in that event the court is allowed to grant *ex parte* relief. However, even if that were the case, due process requires *some* kind of notice be given to all appearing parties. (*McDonald v. Severy* (1936) 6 Cal.2d 629, 631—"The general rule is that notice of motion must be given whenever the order sought may affect the rights of an adverse party." Furthermore, plaintiffs did not bring an *ex parte* application, but rather have

brought a *noticed motion*, and thus are bound to follow the rules for notice of such a motion. Also, courts have found that a statute's use of the term "motion" rather than "ex parte application" *implies* that the notice and hearing requirements are what is required. (See *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1984) 156 Cal.App.3d 82, 85. See also *Carabini v. Superior Court* (1994) 26 Cal.App.4th 239, 242.)

However, the requested relief is more ministerial in nature rather than one that will affect the substantive rights of the appearing cross-defendants. Furthermore, the relief requested is in aid of getting a global settlement executed, which presumably is to the benefit of *all* parties. Thus, on balance, it appears in the interest of judicial economy to grant this motion despite the defects in notice, with the additional requirement for plaintiffs to serve all appearing parties with the order granting the motion.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 9-2-15 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Leon et al. v. Gusaran et al.***
Superior Court Case No. 15 CECG 00900

Hearing Date: September 3, 2015 **(Dept. 503)**

Motions: Demurrer and motion to strike the First Amended Complaint

Tentative Ruling:

To sustain the special demurrer for uncertainty with leave to amend. To overrule all general demurrers. To grant motion to strike with leave to amend. Leave to amend is granted on the conditions listed in the discussion re: the special demurrer for uncertainty.

An amended complaint is to be filed within 15 days of notice of the ruling. Counsel is advised to "start fresh". Boldface need not be used. Notice of the ruling runs from the date that the Minute Order is served by the Clerk.

Explanation:

The Holder Rule

16 C.F.R. § 433.2 "Preservation of consumers' claims and defenses, unfair or deceptive acts or practices" states in full:

In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller, directly or indirectly, to:

(a) Take or receive a consumer credit contract which **fails to contain** the following provision in at least ten point, bold face, type:

NOTICE
ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

or,

(b) Accept, as full or partial payment for such sale or lease, the proceeds of any purchase money loan (as purchase money loan is defined herein), unless any consumer credit contract made in connection with such purchase money loan contains the following provision in at least ten point, bold face, type:

NOTICE
ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

In *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, the Third District Court of Appeal stated:

> The Holder Rule unambiguously allows the buyer to assert against the holder of a consumer credit contract "*all claims* and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds" of the financing. (Italics added.) The plain meaning of the phrase "all claims and defenses which the debtor could assert against the seller" encompasses not only the defensive claims that a buyer might have but also includes causes of action that a buyer might assert against the seller. "The clear and unambiguous language of the contractual provision notifies all potential holders that, if they accept an assignment of the contract, they will be 'stepping into the seller's shoes.' The creditor/assignee will become 'subject to' *any* claims or defenses the debtor can assert against the seller. The notice does not say that a seller will be liable for the buyer's damages only if the buyer received little or nothing of value under the contract. Nor does the notice purport to limit a creditor/assignee's liability in such fashion." (Citation omitted.)
>
> Thus, we agree with the FTC's recent explanation that "[a] creditor or assignee of the contract is thus subject to all claims or defenses that the consumer could assert against the seller. The Holder Rule does not create any new claims or defenses for the consumer; it simply protects the consumer's existing claims and defenses." (Federal Trade Commission Advisory Opinion (May 3, 2012), at p. 2.) *Lafferty*, supra, at p.560.

Accordingly, the District Court determined that the Holder Rule allows a consumer to assert the same "claims and defenses" against the creditor that they might have against the seller. Id. at 563.

> However, the court also opined:
>
> Nonetheless, we hold—to the extent the Laffertys have causes of action against Geweke that are also valid against Wells Fargo by operation of the Holder Rule—their recovery is **limited to the amount they have paid under the installment contract**. The Holder Rule expressly states, "recovery

> hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." (Italics omitted.) Id.

Finally, the court determined that the Holder Rule is not a "cause of action." It reiterated that "private actions to vindicate rights asserted under the [FTC] may not be maintained" citing (*Holloway v. Bristol–Myers Corp.* (D.C.Cir.1973) 485 F.2d 986, 987.) As a result, a consumer must "borrow" a cause of action from "another statute or common law source" to assert against the creditor. Id.

The policy behind the Holder Rule was discussed in *Music Acceptance Corp. v. Lofing (1995)* 32 Cal.App.4th 610:

> In abrogating the holder in due course rule in consumer credit transactions, the FTC preserved the consumer's claims and defenses against the creditor-assignee. The FTC rule was therefore designed to **reallocate the cost of seller misconduct to the creditor.** The commission felt the creditor was in a better position to absorb the loss or recover the cost from the guilty party—the seller. Id. at 628 citing *Home Sav. Ass'n v. Guerra* (Tex.1987) 733 S.W.2d 134, 135.)

Notably, the creditor has recourse against the seller to the extent of any liability incurred, regardless of a statement that the assignment was without recourse. Id. at 622.

RULING

Special Demurrer for Uncertainty

Each cause of action must be numbered separately and its nature stated (e.g., "First Cause of Action for Fraud"). In addition, where there is more than one plaintiff or defendant, the names of the plaintiffs asserting the particular cause of action and the defendants against whom the cause of action is asserted must appear (e.g., "by Plaintiffs Jones and Smith against all Defendants"; or "by all Plaintiffs against Defendant Smith"). [CRC 2.112] Here, Lyndow specially demurs on the grounds that none of the causes of action are alleged against it. The special demurrer for uncertainty will be sustained with leave to amend on the following conditions:

First and foremost, the pleading sets forth initial paragraphs that consist of a narrative of events. Then, all of these paragraphs are incorporated into the first cause of action. Then, each cause of action is incorporated into the subsequent cause of action, like a "chain letter". This type of pleading has been criticized for creating ambiguity and redundancy. See *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1179 and *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 605. More importantly, it asks the Court to "pick and choose" from the narrative to determine which of the facts constitute the elements of the various causes of action from the narrative. But, it is not the Court's responsibility to "make the case for the plaintiff." By pleading in this fashion, the result is that no facts comprising the elements are set forth in the seven causes of action. Instead, only contentions, deductions

and/or conclusions of fact or law are alleged. This is improper. See *Adelman v. Associated Int'l Ins. Co*. (2001) 90 Cal.App.4th 352, 359.

General Demurrers to 1st, 2nd, 4th, 5th, 6th and 7th Causes of Action

Lyndow generally demurs to the first, second, fourth, fifth, sixth and seventh causes of action on the grounds that these causes of action do "not allege a definite amount of damages sought from this demurring Defendant, or any other Defendant, and the total recovery against this demurring Defendant is limited to the amount Plaintiffs actually paid, if any on CONTRACT 32 alleged in the FAC." See Demurrer at pages 2-4. However, a motion to strike, not a general demurrer, is the procedure to attack an improper claim for punitive damages or other remedy demanded in the complaint. A general demurrer challenges only the sufficiency of the *cause of action* pleaded, and must be overruled if *any* valid cause of action is pleaded; a demand for improper relief does not vitiate an otherwise valid cause of action. [*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1561-1562; *Grieves v. Sup.Ct. (Fox)* (1984) 157 Cal.App.3d 159, 164-165; *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 Cal.App.4th 365, 385] Therefore, the general demurrers to the first, second, third, fifth, sixth and seventh causes of action will be overruled.

General Demurrer to the Third Cause of Action

The third cause of action alleges a "Violation of Civil Code § 1632" against Trademark. The cause of action incorporates ¶¶ 1-30. The allegation at ¶ 15 states that Plaintiff Arturo Aparicio "reads, writes and speaks only Spanish." It also alleges that the negotiations were conducted primarily in Spanish. Trademark failed to provide a copy of the contracts in Spanish to Plaintiff Arturo Aparicio as required by Civil Code § 1632. Id.

Civil Code § 1632. "Translation of contracts negotiated in language other than English; necessity; exceptions" states:

(a) The Legislature hereby finds and declares all of the following:

(1) This section was enacted in 1976 to increase consumer information and protections for the state's sizeable and growing Spanish-speaking population.
(2) Since 1976, the state's population has become increasingly diverse and the number of Californians who speak languages other than English as their primary language at home has increased dramatically.
(3) According to data from the American Community Survey, which has replaced the decennial census for detailed socioeconomic information about United States * * * residents, approximately 15.2 million Californians speak a language other than * * * English at home, based on data from combined years 2009 through 2011. This compares to approximately 19.6 million people who speak only English at home. Among the Californians who speak a language other than English * * * at home, approximately 8.4 million speak * * * English very

well, and another 3 million speak English well. The remaining 3.8 million Californians surveyed do not speak English well or * * * do not speak English at all. Among this group, the five languages other than English that are most widely spoken * * * at home are Spanish, Chinese, Tagalog, Vietnamese, and Korean. * * * These five languages are spoken at home by approximately * * * 3.5 million of * * * the 3.8 million Californians with limited or no English proficiency, who speak a language other than English * * * at home.

(b) Any person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the course of entering into any of the following, shall deliver to the other party to the contract or agreement and prior to the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated, that includes a translation of every term and condition in that contract or agreement:

(1) A contract or agreement subject to the provisions of Title 2 (commencing with Section 1801) of, and Chapter 2b (commencing with Section 2981) and Chapter 2d (commencing with Section 2985.7) of Title 14 of, Part 4 of Division 3.
(2) A loan or extension of credit secured other than by real property, or unsecured, for use primarily for personal, family, or household purposes.
(3) A lease, sublease, rental contract or agreement, or other term of tenancy contract or agreement, for a period of longer than one month, covering a dwelling, an apartment, or mobilehome, or other dwelling unit normally occupied as a residence.
(4) Notwithstanding paragraph (2), a loan or extension of credit for use primarily for personal, family, or household purposes * * * in which the loan or extension of credit is subject to the provisions of Article 7 (commencing with Section 10240) of Chapter 3 of Part 1 of Division 4 of the Business and Professions Code, or Division 7 (commencing with Section 18000), or Division 9 (commencing with Section 22000) of the Financial Code.
(5) Notwithstanding paragraph (2), a reverse mortgage as described in Chapter 8 (commencing with Section 1923) of Title 4 of Part 4 of Division 3.

(6) A contract or agreement, containing a statement of fees or charges, entered into for the purpose of obtaining legal services, when the person who is engaged in business is currently licensed to practice law pursuant to Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code.
(7) A foreclosure consulting contract subject to Article 1.5 (commencing with Section 2945) of Chapter 2 of Title 14 of Part 4 of Division 3.
(c) Notwithstanding subdivision (b), for a loan subject to this part and to Article 7 (commencing with Section 10240) of Chapter 3 of Part 1 of Division 4 of the Business and Professions Code, the delivery of a translation of the statement to

the borrower required by Section 10240 of the Business and Professions Code in any of the languages specified in subdivision (b) in which the contract or agreement was negotiated, is in compliance with subdivision (b).
(d) At the time and place where a lease, sublease, or rental contract or agreement described in subdivision (b) is executed, notice in any of the languages specified in subdivision (b) in which the contract or agreement was negotiated shall be provided to the lessee or tenant.
(e) Provision by a supervised financial organization of a translation of the disclosures required by Regulation M or Regulation Z, and, if applicable, Division 7 (commencing with Section 18000) or Division 9 (commencing with Section 22000) of the Financial Code in any of the languages specified in subdivision (b) in which the contract or agreement was negotiated, prior to the execution of the contract or agreement, shall also be deemed in compliance with the requirements of subdivision (b) with regard to the original contract or agreement.
(1) "Regulation M" and "Regulation Z" mean any rule, regulation, or interpretation promulgated by the Board of Governors of the Federal Reserve System and any interpretation or approval issued by an official or employee duly authorized by the board to issue interpretations or approvals dealing with, respectively, consumer leasing or consumer lending, pursuant to the Federal Truth in Lending Act, as amended (15 U.S.C. Sec. 1601 et seq.).
(2) As used in this section, "supervised financial organization" means a bank, savings association as defined in Section 5102 of the Financial Code, credit union, or holding company, affiliate, or subsidiary thereof, or any person subject to Article 7 (commencing with Section 10240) of Chapter 3 of Part 1 of Division 4 of the Business and Professions Code, or Division 7 (commencing with Section 18000) or Division 9 (commencing with Section 22000) of the Financial Code.
(f) At the time and place where a contract or agreement described in paragraph (1) or (2) of subdivision (b) is executed, a notice in any of the languages specified in subdivision (b) in which the contract or agreement was negotiated shall be conspicuously displayed to the effect that the person described in subdivision (b) is required to provide a contract or agreement in the language in which the contract or agreement was negotiated, or a translation of the disclosures required by law in the language in which the contract or agreement was negotiated, as the case may be. If a person described in subdivision (b) does business at more than one location or branch, the requirements of this section shall apply only with respect to the location or branch at which the language in which the contract or agreement was negotiated is used.
(g) The term "contract" or "agreement," as used in this section, means the document creating the rights and obligations of the parties and includes any subsequent document making substantial changes in the rights and obligations of the parties. The term "contract" or "agreement" does not include any subsequent documents authorized or contemplated by the original document

such as periodic statements, sales slips or invoices representing purchases made pursuant to a credit card agreement, a retail installment contract or account or other revolving sales or loan account, memoranda of purchases in an add-on sale, or refinancing of a purchase as provided by, or pursuant to, the original document.
The term "contract" or "agreement" does not include a home improvement contract as defined in Sections 7151.2 and 7159 of the Business and Professions Code, nor does it include plans, specifications, description of work to be done and materials to be used, or collateral security taken or to be taken for the retail buyer's obligation contained in a contract for the installation of goods by a contractor licensed pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, if the home improvement contract or installation contract is otherwise a part of a contract described in subdivision (b).
Matters ordinarily incorporated by reference in contracts or agreements as described in paragraph (3) of subdivision (b), including, but not limited to, rules and regulations governing a tenancy and inventories of furnishings to be provided by the person described in subdivision (b), are not included in the term "contract" or "agreement."

(h) This section does not apply to any person engaged in a trade or business who negotiates primarily in a language other than English, as described by subdivision (b), if the party with whom he or she is negotiating is a buyer of goods or services, or receives a loan or extension of credit, or enters an agreement obligating himself or herself as a tenant, lessee, or sublessee, or similarly obligates himself or herself by contract or lease, and the party negotiates the terms of the contract, lease, or other obligation through his or her own interpreter.
As used in this subdivision, "his or her own interpreter" means a person, not a minor, able to speak fluently and read with full understanding both the English language and any of the languages specified in subdivision (b) in which the contract or agreement was negotiated, and who is not employed by, or whose service is made available through, the person engaged in the trade or business.

(i) Notwithstanding subdivision (b), a translation may retain the following elements of the executed English-language contract or agreement without translation: names and titles of individuals and other persons, addresses, brand names, trade names, trademarks, registered service marks, full or abbreviated designations of the make and model of goods or services, alphanumeric codes, numerals, dollar amounts expressed in numerals, dates, and individual words or expressions having no generally accepted non-English translation. It is permissible, but not required, that this translation be signed.
(j) The terms of the contract or agreement that is executed in the English language shall determine the rights and obligations of the parties. However, the

translation of the contract or the disclosures required by subdivision (e) in any of the languages specified in subdivision (b) in which the contract or agreement was negotiated shall be admissible in evidence only to show that no contract was entered into because of a substantial difference in the material terms and conditions of the contract and the translation.
(k) **Upon a failure to comply with the provisions of this section, the person aggrieved may rescind the contract or agreement in the manner provided by this chapter.** If the contract for a consumer credit sale or consumer lease that has been sold and assigned to a financial institution is rescinded pursuant to this subdivision, the consumer shall make restitution to and have restitution made by the person with whom he or she made the contract, and shall give notice of rescission to the assignee. Notwithstanding that the contract was assigned without recourse, the assignment shall be deemed rescinded and the assignor shall promptly repurchase the contract from the assignee.

But, the recent decision of *Lopez v. Asbury Fresno Imports, LLC* (5th Dist. 2015) 234 Cal.App.4th 71 holds that there is an exception to the California Translation Act where a non-English speaking party negotiates a contract through his or her own interpreter who can review the contract in English and advise the buyer whether it accurately reflects the terms agreed to during negotiations in the foreign language. Id. at 77. In the First Amended Complaint, the allegations states that only one Plaintiff, Arturo Aparicio did not speak English. Accordingly, if Plaintiff Valeria Leon spoke English and acted as an interpreter for Mr. Aparicio, then the provisions of the California Translation Act would not apply.

As for the specific grounds of the demurrer, Defendants attack the allegation that violation of § 1632 is a "tort per se" and a result, they are entitled to punitive damages. See ¶ 39. Defendant is correct that that the statute provides for the remedy; to wit, rescission. Yet, the Plaintiffs do seek rescission at ¶ 38. As a matter of law, a general demurrer does not lie to only *part* of a cause of action. If there are sufficient allegations to entitle plaintiff to relief, other allegations cannot be challenged by general demurrer. [*Kong v. City of Hawaiian Gardens Redevelop. Agency* (2003) 108 Cal.App.4th 1028, 1046; *PH II, Inc. v. Sup.Ct. (Ibershof)* (1995) 33 Cal.App.4th 1680, 1682] Therefore, the general demurrer to the third cause of action will be overruled.

Motion to Strike

Defendant moves to strike the entire third cause of action; ¶¶ 24, 30, 40 50, 61; page 14 lines 5-6; page 14 line 20; and page 15 lines 8 and 9. The motion to strike is aimed at the third cause of action for violation of Civil Code §1632 as well as the damage allegations set forth in each cause of action and the prayer. The motion to strike the third cause of action in its entirety will be granted with leave to amend. As stated supra, there is an exception that might render the cause of action meritless. In addition, there is no doctrine entitled "tort per se." Plaintiffs are not entitled to punitive damages. See Civil Code § 1632. As for the damage allegations and the prayer, the

motion will be granted with leave to amend as well. The Holder Rule limits the Plaintiffs recovery against Lyndow to **the amount they have paid under the installment contract**.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 9-2-15 .
(Judge's initials) (Date)